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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

THE NEW YORK, CHICAGO, AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

NICK MASIGLOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Your Petitioner, The New York, Chicago and St. Louis Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered by that Court in this cause on October 8, 1956.

OPINIONS BELOW.

The Court of Appeals did not render an opinion in this case. The opinion of the District Court is not officially reported. A copy of that opinion is found at page 11 of the Appendix.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit, as to which review is sought herein, was dated and entered October 8, 1956. It is set forth in the Appendix hereto, page 13. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1)

QUESTION PRESENTED.

Whether, under the provisions of the Federal Employers' Liability Act, Title 45, United States Code, Sections 51 *et seq.*, a railroad is entitled to a directed verdict, in an action involving injury to its employee, acting in the course and scope of his employment, where the proximate cause of the accident which resulted in said injury was the negligence of the employee who failed to exercise ordinary care for his own safety, specifically in that he failed to utilize the facilities provided by the railroad and available at the time for the performance of his work.

STATUTE INVOLVED.

The statutory provision involved is Title 45, United States Code, Section 51:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE.

Petitioner, The New York, Chicago and St. Louis Railroad Company, commonly referred as the Nickel Plate Road, is a railroad corporation engaged in the interstate transportation of passengers and freight. The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act, Title 45, United States Code, Section 51.

Respondent was employed by the petitioner as a car repairman's helper and had been engaged in that occupation since 1936. On March 14, 1950, the respondent was assisting car repairmen by bringing them material which they needed to complete their work (R. 10). The respondent was teamed with and assisted by another car repairman's helper by the name of Dean Hackenburg. These two employees were of equal rank insofar as their employment on the railroad was concerned. That is to say, neither Hackenburg nor the respondent had authority over each other (R. 36). On the date of the accident some of the men engaged in repairing railroad cars asked respondent and Hackenburg to bring them some lining which they needed to complete their job. This lining consisted of wooden boards which were about 18' in length, 5⅞" in width and ⅞" thick (R. 12). These pieces of lumber were secured together with string, each bundle containing approximately four sections of lining (R. 13). There was a conflict in the evidence as to how many bun-

dles of lining the respondent and Hackenburg attempted to carry just prior to the time respondent claims to have sustained his injury (R. 14, 51). At any rate, respondent and Hackenburg discussed the matter in an attempt to arrive at the best possible way to carry the lumber. As the result of this conversation they mutually agreed to lift some of the bundles of lining and to carry them manually over to the car repairmen (R. 14). Respondent was injured while carrying this lining.

The petitioner provided carts which were available to respondent and his assistant upon which the lumber could have been loaded and transported (R. 37). If the respondent and his assistant had used these carts there would have been no necessity to carry the bundles of lumber manually and no accident would have occurred.

Two factors are immediately apparent from this brief recital of the facts.

1. The plan adopted by respondent and Hackenburg for transporting the lumber to its destination was arrived at as the result of a mutual agreement by the two men and not as the result of any order from any of petitioner's supervisory personnel.

2. The petitioner had provided carts which were available at the time, the use of which would have obviated the necessity of carrying the lumber manually.

The petitioner moved for a directed verdict at the close of respondent's case which motion was overruled (R. 49). This motion was renewed at the conclusion of all of the evidence and was also overruled (R. 70).

Petitioner's motions for judgment notwithstanding the verdict and for a new trial were both overruled on September 17, 1955. A copy of the memorandum opinion of that ruling is set forth in the Appendix, p. 11.

The United States Court of Appeals for the Sixth Circuit affirmed the orders of the District Court. No opinion was rendered.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decisions of the Court of Appeals for the Seventh and Fifth Circuits. *Jackson v. Illinois Northern Railway,* 224 F. 2d 76 (1955); *Wadiak v. Illinois Central Railroad Company,* 208 F. 2d 925 of the Seventh Circuit and *Texas and Pacific Railway Company v. Thompson,* 232 F. 2d 313 (1956) of the Fifth Circuit. A Petition for a Writ of Certiorari was granted in *Texas and Pacific Railway Company v. Thompson, supra,* on October 22, 1956.

In *Jackson v. Illinois Northern Railway,* 224 F. 2d 76, the plaintiff was injured when he attempted to pick up with his hands a large frozen mass of sand instead of breaking it into smaller pieces so that he could shovel it. The Court of Appeals for the Seventh Circuit said that the failure of the plaintiff to make additional little pieces from the big piece he chose to move manually, hardly provides the basis for imposing liability on defendant even under the Federal Employers' Liability Act. The Court concluded the opinion as follows on page 78:

> "Those principles announced, explained, and applied by Judge Lindley in *Wadiak v. Illinois Central R. Co.,* 7 Cir., 1953, 208 F. 2d 925, are applicable to Jackson's appeal and support the trial judge's allowance of defendant's motion."

Wadiak v. Illinois Central R. Co., 208 F. 2d 925, is directly in conflict with the instant case. In that case, as in ours, the plaintiff and his assistant made the decision

as to how to perform their work. At page 928 of the opinion it is stated:

> "* * * The only permissible inference is that adequate equipment with which to do the work safely was available and that the workmen themselves made the decision to do the lifting by hand,—not any supervisory agent of defendant.
>
> "Nor did plaintiff's testimony include any proof that assistance could not have been had if it was determined advisable to move the barrel by hand. * * *"

The Trial Court in the instant case based its ruling on *Stone v. New York, Chicago and St. Louis Railroad Co.*, 344 U. S. 407 (Appendix p. 13). However, Judge Lindley in the *Wadiak* case, *supra*, distinguished the *Stone* case as follows at page 929 of the opinion:

> "* * * Plaintiff can find no comfort in this respect in *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441, where the person who ordered plaintiff 'to pull harder' was his superior, in charge of a section gang of which plaintiff was part. Furthermore, in that case there was substantial evidence of negligence in defendant's failure to furnish adequate man power and in the manner in which the 'straw boss' ordered the work done."

This distinction is equally applicable in our case.

Judge Martin in his opinion overruling petitioner's motion for final judgment and for a new trial conceded that the instant case was in conflict with the *Wadiak* case. (Appendix p. 13.)

> "The case mainly depended upon by defendant's astute attorney, *Wadiak v. Illinois Central R. Co.* (CA 7th), 208 F. 2d 925, rests upon its own special facts but inasfar as it gainsays, the viewpoint ex-

pressed in the opinion is not binding in this Circuit and will not be followed."

In *Texas & Pacific Railway Company v. Thompson*, 232 F. 2d 313, the decision of the Fifth Circuit Court is also directly in conflict with the instant case. (This Court granted a Petition for a Writ of Certiorari on October 22, 1956.) The *Thompson* case, *supra*, presents the same factual pattern. The employee was injured because, as she alleged, the railroad refused her request for additional help to handle an unusually large amount of mail. She presented no evidence to substantiate her claim and it was on this basis that the Fifth Circuit Court reversed the trial court. The Court stated at page 318:

> "* * * Her claim is based rather on the sum total of the operation of loading and unloading the mail on this particular day than on the weight of any particular sack of mail. There is no showing that she had ever intimated to the Railroad that the method of doing the work was improper, that the quantity of the work was too great for her to perform or that the presence of any other workman on the truck—if there were room for more than one—would have been of assistance to her except to replace her in the doing of the work. * * *"

The foregoing decisions indicate to some extent the conflict which exists among the aforementioned Circuits. These conflicts should be reconciled by this Court.

2. Clearly, the question presented is important for the guidance of the judiciary, both Federal and State, who sit in judgment on cases arising out of the Federal Employers' Liability Act, 45 U. S. C. Section 51 as well as attorneys who prosecute and defend cases under this Act. Ever since this Court's decision in *Lavender v. Kurn*, 327 U. S. 645, any attorney who defends an action under this

Act must, of necessity, revise his concepts of negligence, liability and proximate cause. These concepts, or fundamentals if you will, were well established and clearly defined until the *Lavender* decision. The old "ground rules" have apparently been discarded. This in and of itself is not necessarily bad. However, no new rules have been formulated to replace the old. This Court still insists that negligence is, and remains, the sole basis for recovery under the Federal Employers' Liability Act. Despite this noble pronouncement, jurors are permitted to indulge in fantastic speculation, often times unsupported by any credible evidence in railroad employee cases. It was said by Mr. Justice Black in *Wilkerson v. McCarthy*, 336 U. S. 53, at page 61:

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute *insurer* against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. Coray v. Southern P. R. Co., 335 U. S. p. 807, ante, 363, 69 S. Ct. 29. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a *reasonable and prudent person* would have done under the same circumstances. * * *" (Emphasis added.)

From the foregoing we can only conclude that while the labels remain the same, i.e., negligence, insurer, reasonable and prudent man, they have taken on an entirely new meaning in their application to cases arising under this Act.

In *Stone v. New York, Chicago and St. Louis R. Co.*, 344 U. S. 407, the dissenting opinion of Mr. Justice Frankfurter summarizes our frustrations at p. 410.

"However, the central components of liability for negligence—that it rests upon fault and that appropriate causality must be established between the negligent circumstances and the complained-of injury —are the same for actions under the Federal Employers' Act as for any other negligence actions. For reasons that I for one have long deplored, Congress has seen fit to make such a concept of negligence the basis of compensation for inevitably untoward incidents.

"I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it was adapted but brutally unfit for the situations to which the Federal Employers' Liability Act requires that it be put. *The result is a matter of common knowledge. Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.*" (Emphasis added.)

We feel that the reasons for review in this case are compelling. The uncertainty presently existing can only be dispelled by decision from this Court. It should either explain the old rules or provide us with new ones.

3. The decision of the court below is believed to be erroneous and the conflicting decisions of *Jackson v. Illinois Northern Ry.*; *Wadiak v. Illinois Central R. Co.*; and *Texas and Pacific Ry. Co. v. Thompson* (*supra*), are correct. These cases have fact situations fundamentally indistinguishable from the instant case. These decisions all

conform to the principles outlined by this Court for the guidance of bench and bar in cases arising under the Federal Act. If the carrier is not an insurer, if negligence remains the sole basis for recovery under this Act then these decisions are correct and the decision of the Trial Court and of the Court of Appeals for the Sixth Circuit in our case are incorrect and erroneous.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:

HORNBECK, RITTER & VICTORY,
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APPENDIX.

OPINION AND ORDER OF THE DISTRICT COURT ON MOTION OF DEFENDANT FOR NEW TRIAL.

MARTIN, *J.*:

Careful consideration has been given to the motion of the defendant railroad carrier to vacate and set aside the verdict of the jury and the judgment of the court thereon and to grant the defendant a new trial.

The arguments and the briefs of the attorneys for both sides and the transcript of the testimony of the plaintiff, and of defendant's eye-witness Dean F. Hackenburg, have been read and analyzed. The authorities cited in the briefs filed by the attorneys for the contending parties have been read and weighed. The conclusion has again been reached, announced at the end of the introduction of the evidence in the case, that the motion of defendant for directed verdict is not well grounded.

Viewing the testimony in the light most favorable to the plaintiff, as a trial court is obliged to do upon a motion for directed verdict, there was substantial evidence upon which the jury could find negligence upon the part of the defendant if it believed testimony of the plaintiff. This testimony was to the effect that the employer failed to furnish an adequate number of carmen helpers to perform the labor required on the date of the accident, with the result that plaintiff and Hackenburg were unduly hustled by the carmen to supply needed lining for the railroad car, —the plaintiff testifying positively that a carman "hollered" or "yelled" at him "to get the stuff." The result was that at the suggestion of Hackenburg, plaintiff said that he lifted, at his end, three bundles of planks, each bundle containing four pieces each of which weighed 18 to 20 pounds.

The plaintiff testified that Hackenburg first picked up his end from the ground and that the plaintiff then picked up the other end and when he lifted the bundles to his shoulder something "clicked" or "cracked" in his back. He said that with Hackenburg he carried the load to the car, when Hackenburg dropped the load from his shoulder and the plaintiff couldn't hold his end any longer and let the planks drop to the ground. He then felt severe pain and was compelled to quit work because he felt sick.

In overruling a motion for a directed verdict at the conclusion of all the evidence the reasons therefor were stated from the Bench and dictated into the record. Several authorities were cited and upon full reconsideration it is believed that the reasons then given were valid,—it would seem unnecessary to repeat the citations then given but to them might be added the following decisions of the Sixth Circuit Court of Appeals:

In *Keith v. Wheeling & Lake Erie Ry. Co.*, 160 F. 2d 654, 658, former Chief Judge Hicks stated:

> "* * * The authority of courts by direction of verdict, to withdraw from the consideration of a jury matter bearing upon the question of defendant's negligence and its proximate relation to the injury is now very restricted indeed."

See also *Hutchins v. Akron, Canton & Youngstown R. Co.*, 162 F. 2d 189, 192; *Massey v. Chattanooga Station Co.*, 210 F. 2d 167 (CCA 6th) 1954, certiorari denied 348 U. S. 896; where the court said:

> "The Supreme Court made it plain in the Tennant case, *supra*, that trial judges are not free to set aside jury verdicts merely because 'judges feel that other results are more reasonable'."

It may not be amiss to state again that the opinion of Judge McVicar in *Whitted v. Aliquippa & Southern R. Co.*

(W. D. Pa.), 112 F. Supp. 599, a case analogous to that at bar, is a well-reasoned decision. The case mainly depended upon by defendant's astute attorney, *Wadiak v. Illinois Central R. Co.* (CA 7th), 208 F. 2d 925, rests upon its own special facts but inasfar as it gainsays, the viewpoint expressed in the opinion is not binding in this Circuit and will not be followed.

In conclusion, the opinion of the Supreme Court in *Stone v. New York, C. & St. L. R. Co.* (1953), 344 U. S. 407, though stronger for the plaintiff on its facts than the case at bar, has binding authoritative value in evincing the proposition that appraisal of the facts should be left to the jury.

Accordingly, the motion of the defendant is overruled and the exception of the defendant to the action of the court is duly noted.

/s/ JOHN D. MARTIN,

Circuit Judge, Sitting by Designation.

September 16, 1955.

JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered October 9, 1956.)

This case came on to be heard on the record and briefs and oral argument of counsel;

And it appearing that there is no reversible error in the record:

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed upon the grounds and for the reasons stated in the opinion and order of the District Court on motion of defendant for new trial.

Office - Supreme Court
FILED
FEB 2 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 678.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

NICK MASIGLOWA,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Certiorari to the United States Court of Appeals For the Sixth Circuit.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 678.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

NICK MASIGLOWA,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Certiorari to the United States Court of Appeals For the Sixth Circuit.

The Petition for Certiorari in this case seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit entered by that Court in this cause on October 8, 1956. The Court of Appeals judgment affirmed the decision of the United States District Court for the Northern District of Ohio, Eastern Division in which the District Court refused to set aside the jury verdict in favor of the plaintiff for $4,000 and direct a verdict for the defendant.

OPINIONS BELOW.

The opinion of the District Court is officially reported in 135 F. Supp. 816. The Court of Appeals did not render an opinion.

QUESTIONS PRESENTED.

In respondent's view, petitioner's statement of the questions presented by the present case is inadequate and misleading. The issue with which petitioner's question attempts to deal should be stated as follows:

Whether in an action brought under the provisions of The Federal Employers' Liability Act, the defendant is entitled to a directed verdict where the evidence disclosed that the company was short handed of car repairmen's helpers and the plaintiff and his fellow workman, both car repairmen's helpers, were being hurried by their superiors to obtain material, and where pursuant to being hurried they carried an excessive load, the weight of which, together with the fact that the fellow workman subsequently dropped his end of the load, resulted in injuries to the plaintiff?

STATEMENT OF CASE.

The respondent was employed as a car repairman's helper at the petitioner's Conneaut, Ohio shops (R. 6). Helpers assist car repairmen by bringing them the material they need to perform their work (R. 7), and car repairmen have the authority, without getting the permission of their foreman, to order helpers to get them any materials or supplies which they need (R. 54).

On March 14, 1950, the date of the accident which is the subject matter of this action, the respondent was teamed with another helper named Dean Hackenburg, a man approximately 40 years of age (R. 9). Hackenburg was a big man, just under six feet in height and weighing about 228 pounds (R. 52). The respondent, on the other hand, was a relatively small individual being approximately five feet six inches in height and weighing about

160 pounds (R. 9). The respondent, a man 54 years of age, was also considerably older than his co-worker, Hackenburg (R. 6).

On the date of the accident there was a heavy snow on the ground, and it was also probably snowing at the time (R. 9).

Respondent and Hackenburg were assigned to assist between twelve (R. 10) and twenty (R. 53) carmen by bringing them materials which they needed to perform their work (R. 10). Normally about five to six helpers were assigned to assist the carmen in this area (R. 9, R. 53); however, on the date of the accident there were only three, including respondent (R. 10).

Due to the fact that there was a shortage of helpers (R. 43, R. 47), the carmen were all waiting for materials to do their work (R. 11, R. 14), and for that reason "everybody was hollering" at the respondent and Hackenburg to bring them materials (R. 11, R. 14, R. 47). Respondent's exact testimony on this point was as follows:

> "Q. Was there more than one gang that asked for it?
>
> A. There was more than one gang because everybody was waiting for stuff.
>
> Q. Did they holler to you?
>
> A. Well, we don't have a chance, but we bring in that one place and we have to go to another place, to bring what they need." (R. 11.)

At the time of the accident, certain carmen had ordered the respondent and Hackenburg to get linings for the inside of a railroad car. These linings were boards about 7/8" thick, 5 7/8" wide, and 18' long, weighing about 18-20 pounds (R. 12). They were tied four in a bundle (R. 13). Respondent and Hackenburg went to the shed in which the linings were located. Because of the pressure

being exerted on them to hurry, because the carmen were all waiting for material (R. 43, R. 47), and because the carmen were all hollering at them (R. 47); Hackenburg suggested he and respondent carry three bundles (R. 14). Respondent had never carried three bundles before (R. 14), but because of the urgency of the situation and the shortage of help (R. 43), they attempted to carry three bundles (R. 41, R. 46). Respondent's testimony with regard to the reason three bundles were carried was as follows:

> "The Court: You ordinarily would take one bundle at a time, wouldn't you? Did I understand you to say this was the first time you had carried three bundles in one load?
>
> The Witness: That's on account of shy help and everybody was waiting for work—I mean everybody was waiting for material—well, you have to do maybe more than you are supposed to." (R. 43.)
>
> * * * * *
>
> "The Court: What other things were there besides the talk you had with this man that induced you to decide to carry the three bundles instead of one or less than three?
>
> The Witness: Well, we was shy of help, and everybody was hollering for material." (R. 46-R. 47.)

The testimony of petitioner's witness, Hackenburg, varied from the respondent's testimony with regard to how many boards were carried and with regard to whether or not there was a shortage of helpers (Hackenburg could not recall). However, on cross examination it became clear that Hackenburg was a hostile witness and his memory with regard to what happened was very confused. He stated under direct examination that he and respondent only carried one bundle of lining; however, on cross-examination he admitted that he and respondent may have

carried two bundles (R. 69). He admitted that he may have told Mr. Stern, one of respondent's attorneys, that he and respondent carried two or three bundles (R. 56). He admitted that he might have told Mr. Stern that there were not over eight boards in a bundle (R. 57). He stated that the stack of lumber they carried was about 8 inches high [since the boards were ⅞" thick, this would mean that they carried at least 8 boards or two bundles] (R. 67). He admitted that shortly after the accident he gave a statement to the effect that he did not recall how many boards were carried (R. 65). Hackenburg also admitted that, taking respondent's strength into consideration, three bundles were too much weight for himself and respondent to carry (R. 66).

In its statement of facts the petitioner indicated that respondent and Hackenburg had a conversation regarding the best method of transporting the lumber [Petitioner's brief page 4]. Actually their conversation was very brief and was concerned with not just the best method, but mainly the *quickest* method (R. 45-46). The reason for the conversation and their subsequent action is summed up in the following testimony of the respondent:

> "The Court: What other things were there besides the talk you had with this man that induced you to decide to carry the three bundles instead of one or less than three?
>
> The Witness: Well, we was shy of help, and everybody was hollering for material." (R. 47.)

The bundles were stacked on the ground (R. 14). Hackenburg first picked up one end of them, putting the end on his shoulder. Respondent then picked up the other end and while so doing he felt something crack in his back (R. 15). Respondent and Hackenburg carried the linings about 200 feet to the car (R. 39), and then Hackenburg

dropped his end in the car (R. 15). This left the little man (respondent) carrying the whole load of approximately 216 to 240 pounds, and this sudden increase in weight and severe jolt caused respondent so much pain (R. 15, R. 39) that he was forced to drop his own end of the load to the ground (R. 39). Respondent's testimony showed negligence on Hackenburg's part in the manner in which Hackenburg dropped his end of the load. Respondent's testimony is as follows:

> "* * * A. When he got to the car he drop his end and I drop my end on the floor because my eyes can't move.
>
> Q. Did you carry it?
>
> A. We carried it as far as the car and he drop his end. *If he put maybe a little easier it probably wouldn't be hurting my back.* And he drop his end in the car, and I was on the other end and I have to drop mine because I couldn't hold it any longer. I got blue, and I went into the lunchrcom just—I don't know, maybe twenty feet." (R. 15.) (Emphasis added.)

That respondent sustained a serious and permanent injury to his back is not questioned.

ARGUMENT.

A. The Right to a Jury Trial.

Under the American system of jurisprudence, it is a basic and fundamental right of a plaintiff in a negligence case to have all issues of fact tried by a jury. This Court has recognized and emphasized the importance of submitting to the jury questions of fact arising in actions brought under the Federal Employers' Liability Act.

In *Bailey v. Central Vermont Ry. Co.*, (1943) 319 U. S. 350, at page 353, Justice Douglas said:

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * * *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded to them.*" (Emphasis added.)

This Court, in *Blair v. B. & O. R. Co.*, (1944) 323 U. S. 600, stated as follows:

> "To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

This Court has for many years made it clear that as long as the jury system is the law of the land and the jury is made the appropriate tribunal to try disputed questions of fact, this Court will protect that right. In *Tiller v. Atlantic Coastline R. Co.*, (1943), 318 U. S. 54, at page 67, this Court, by Justice Black, said:

"No case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, '*We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.*' Jones v. East Tennessee V. & G. R. Co., 128 U. S. 443, 445." (Emphasis added.)

This rule of law was set forth as follows by this Court in *Lavender v. Kurn*, (1946), 327 U. S. 645; at page 653:

"*It is no answer to say that the jury's verdict involved speculation and conjecture.* Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

The scope of the issues to be entrusted to the jury was again set forth recently by this Court in *Schulz v. The Pennsylvania R. Co.* (1956), 350 U. S. 523, wherein Justice Black said:

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind

that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '(W)*e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.*' Jones v. East Tennessee, V. & G. R. Co., 1888, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478." (Emphasis added.)

B. There Was Sufficient Evidence of Defendant's (Petitioner's) Negligence to Require Submission to the Jury.

In the instant situation there was ample evidence of negligence to require submission to the jury. There was direct testimony indicating the following:

1. The company was short handed of carmen's helpers on the day of the accident. The normal number was six, but on the day of the accident there were only three (including respondent) to assist about 20 carmen.

2. Due to the fact that they were short handed, Hackenburg and respondent were hurried by the carmen when they went for lining.

3. As a result of the pressure from the car repairmen, Hackenburg suggested that they carry three bundles and respondent reluctantly followed his lead. As respondent picked his end up he felt pain in his back.

4. After respondent and his co-worker, Hackenburg, had carried the lumber to the railroad car, Hackenburg dropped his end of the load jarring respondent severely and leaving respondent, a relatively small man, supporting a load of 216-240 pounds himself. From respondent's testimony, it was clear that his co-worker had dropped his end of the lumber quite hard and that respondent might not have been so severely injured if Hackenburg had put down the lumber more carefully. Respondent stated as follows on direct examination:

"* * * If he put maybe a little easier it probably wouldn't be hurting my back." (R. 15.)

5. On the day of the accident there was a heavy snow on the ground and, giving the plaintiff the benefit of any inference from the facts as we must on a defendant's motion for a directed verdict, it may be inferred that the carts could not be used. There is no evidence that adequate equipment was available which could be used in the snow.

It is interesting to note that the plaintiff's counsel in his petition for certiorari has failed to discuss or mention the grounds of negligence set forth in item 4 above, and, in addition, he has failed to cite any cases which would indicate that the facts set forth in item 4 would not constitute negligence which was attributable to the petitioner.

Items 1 through 5 above set forth ample evidence from which a jury could have reasonably inferred that the petitioner was negligent. Under these circumstances, it is not the function of a court to search the record for conflicting evidence in order to take the case away from the

jury. This rule of law was clearly and concisely set forth by this Court in *Tennant v. Peoria & P. U. R. Co.*, (1944) 321 U. S. 29, the Court at page 35 said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of a particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * *. That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. *The courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Emphasis added.)

All of the facts in the instant case comprise a situation to be appraised in its entirety. The shortness of help, the heavy snow, the urgent demands for materials from respondent's superiors, and the dropping by Hackenburg of his end of the load, when considered together clearly paint a picture from which a jury might have inferred that petitioner was negligent. As stated in *Stone v. N. Y. C. & St. L. R. Co.*, (1953), 344 U. S. 407:

> "The experience with stubborn ties, the alternative ways of removing them, the warning by petitioner that he had been pulling as hard as he could, the command of his superior to pull harder, the fact that more

> men were usually used in these circumstances—all these facts comprise the situation to be appraised determining whether respondent was negligent. Those circumstances were for the trier of the facts to appraise."

In *Blair v. B. & O. R. Co.*, (1944), 323 U. S. 600 at page 604, this Court stated the rule as follows:

> "The negligence of employer may be determined by viewing its conduct as a whole. * * * And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

Such a situation exists in the instant case. The several elements from which negligence might be inferred are so closely interwoven as to form a single pattern.

The District Court's opinion in the instant case referred to a "well-reasoned decision" by Judge McVicar in *Whitted v. Aliquippa & Southern Ry. Co.*, (W. D. Penn.), 112 F. Supp. 599. The facts in the *Whitted* case are very similar in many respects to those in the instant case. In that case, the plaintiff was injured while carrying a 14 foot switch tie with only four men, where six men were required. It appeared that the four men were not ordered to carry the tie, but did so because they were short handed that day. The defendant denied it was negligent and asserted that the plaintiff contributed to his injury in the manner in which the tie was lifted and in failing to request more help to carry it. The court held that there was sufficient evidence to support the jury's verdict for the plaintiff.

In a decision handed down only six months ago, the District Court for the Western District of Pennsylvania in *Constantine v. Aliquippa and Southern Ry. Co.*, 144 F.

Supp. 39 (1956), analyzed the province of the jury with respect to the drawing of inferences of negligence. In that case the court held that the jury could reasonably conclude that the failure of the defendant railroad to provide the plaintiff with sufficient man power constituted an unsafe place to work and was the proximate cause of his injury. The court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness is telling the truth and the inferences to be drawn from the uncontroverted facts and the controverted facts are questions for the jury. If there is a reasonable basis in the record for concluding that it was negligence of the employer which caused the injury, it would be an invasion of the jury's function for the court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Thomas v. Connemaugh and Black Lick R. Co., 3 Cir., 234 F. 2d 429.
>
> "Upon recapitulation of all the credible evidence, I am convinced that the quantum of proof is such that a jury could reasonably conclude that failure of defendant railroad to provide plaintiff with sufficient man power constituted an unsafe place to work and was a proximate cause of his injury * * *" (144 F. Supp. at page 41).

In the instant case, acts of negligence on the part of the petitioner have been established. The shortage of help, the hollering for materials, the orders to hurry on the part of the respondent's superiors, the initial suggestion on the part of Hackenburg, and the dropping of his end by Hackenburg, all contributed to respondent being injured. There was indeed substantial and abundant evidence in the instant case warranting the jury determining that the petitioner was negligent.

C. There is No Conflict of Authority Among the Courts of Appeals Requiring Settlement by This Court.

Petitioner claims that this Court should take jurisdiction because there is a conflict between the decision of the Sixth Circuit in the instant case and the Seventh and Fifth Circuits. Petitioner relies on *Jackson v. Illinois Northern Ry.*, 224 F. 2d 76 (1955), and *Wadiak v. Illinois Central R. Co.*, 208 F. 2d 925 (1953), decided by the Court of Appeals for the Seventh Circuit and *Texas & Pacific Ry. Co. v. Thompson*, 232 F. 2d 313 (1956), decided by the Court of Appeals for the Fifth Circuit. All three of these cases rest on their special facts. Only one of these three cases (*Wadiak v. Illinois Central R. Co., supra*) even remotely resembles the facts in the instant case, and even that case lacks any reference to the main grounds of negligence in the instant case, *i.e.* the element of respondent being hurried by his superiors, and also the factor of Hackenburg dropping his end of the lumber.

Basically there is no conflict in the principles of law set forth in the above three cases and in the instant case; although with respect to one phase of the *Wadiak* case it might be in conflict in some degree with the decision of this Court in *Lavender v. Kurn, supra,* and the recent case of *Schulz v. Pennsylvania R. Co., supra,* and with the decision of the Court of Appeals for the Third Circuit in *Thomas v. Connemaugh and Black Lick R. Co.*, 234 F. 2d 429 (1956).

An analysis of the factual situation in the three cases relied on by the petitioner will indicate the inapplicability of these cases to the instant case.

With respect to *Texas and Pacific R. Co. v. Thompson, supra,* decided by the Fifth Circuit, the Court of Appeals held that the District Court should have directed a verdict for the defendant because the plaintiff had failed to of-

fer any proof whatsoever of her basic charge of negligence. In that case, part of the regular duties of the plaintiff required her to handle mail. The sole basis of negligence alleged in her complaint was "that the handling of the unusually large mail on that date (December 3rd) was beyond her physical strength and that she asked her employer for help which it refused." (232 F. 2d, at page 313). The District Court submitted the case to the jury on this claim of negligence, refusing the railroad's request for a directed verdict, and the jury returned a verdict for plaintiff. *The Court of Appeals for the Fifth Circuit reversed on the ground that the plaintiff had failed to offer any evidence to sustain the basic charge in her complaint.* The Court of Appeals said:

> *"Appellee offered no evidence at all to sustain the basic charge of her complaint that she asked for and was refused assistance in handling the 'unusually large quantity of mail' on the date of her injury."*
>
> "The court below submitted the case to the jury on that charge of negligence alone, using almost identical language. Appellee was asked several times if she requested any additional help or asked certain named individuals to help her, and she stated categorically that she did not ask any help * * *" (232 F. 2d at pages 315, 316.) (Emphasis added.)
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> * * * * *
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> "At all events, taking appellee's own statements and drawing therefrom all permissible inferences, there is no tendency on the part of the evidence to sustain the charge quoted above that she had on December 3rd requested assistance in unloading an unusually large quantity of Christmas mail and had been refused such assistance. By basing her complaint on this allegation and by placing it before the jury as the *sole* charge of negligence, she recognized that, under the law, she had no case unless she could

sustain this charge of negligence." (232 F. 2d at page 316.) (Emphasis added.)

It could hardly be claimed that a decision of the Fifth Circuit based on a theory that the plaintiff failed to offer *any* evidence of negligence could be in conflict with the decision of the Sixth Circuit in the instant case in which there was proof of several elements of negligence. It is, therefore, submitted that there is no conflict in authority between the Fifth and Sixth Circuits.

Although the facts in the instant case are much stronger for the respondent on the question of negligence than in the *Thompson* case, it must be noted that this Court has already granted certiorari to the plaintiff in the *Thompson* case. (October Term, 1956, No. 321.)

As far as the decisions of the Seventh Circuit are concerned, these decisions also rest on their particular facts. In *Jackson v. Illinois Northern Ry. Co., supra*, the plaintiff picked up a large piece of frozen sand and suffered a hernia when the piece crumbled in his hands and he lurched forward. The plaintiff at the time was furnished with a pick and shovel and he could easily have broken the lump of sand into smaller pieces before picking it up. The plaintiff just made a poor decision. The choice was strictly his own. He was not influenced by any outside or superior forces and there was no pressure on him of any kind. No one instructed the plaintiff in the *Jackson* case to pick the frozen sand up with his hands, there was no evidence of his being hurried in his work, there was no evidence of his being short-handed, nor was the negligence of a fellow servant involved. In view of the particular factual situation in the *Jackson* case, there is no conflict of authority between the decision of the Seventh Circuit in that case and the Sixth Circuit in the instant case. In addition, there is no conflict between any

proposition of law decided by the Seventh Circuit in the *Jackson* case and those set forth by the lower courts in the instant case.

The third case relied on by the petitioner is *Wadiak v. Illinois Central Ry., supra*, decided by the Court of Appeals for the Seventh Circuit. The dissimilarity in the factual situation between the instant case and the *Wadiak* case is immediately apparent. In the *Wadiak* case, six barrels had broken loose in a railroad car. The plaintiff and a co-worker used a chain hoist, jack and block to lift five of the barrels. Then they decided to lift the sixth barrel manually *although the chain hoist, jack and block were still in the car and available for use.* In the instant case the evidence disclosed that there was heavy snow on the ground and it may be inferred that the carts were not available for use on that day. At least it was a question of fact for a jury to determine. Furthermore, the testimony throughout the instant case points up the fact that they were short-handed. A further factor is that Wadiak was a car repairman whereas Masiglowa was a car repairman's helper and was subject to the orders of the car repairmen who were all hollering at him to bring materials. In addition to all this, there was *the very important factor* in the instant case *of the negligence of a fellow servant* when Hackenburg dropped his end of the load severely jarring respondent and leaving him supporting the entire weight himself.

In view of the essential differences between the decision of the Court of Appeals for the Sixth Circuit in the instant case and the Court of Appeals for the Seventh Circuit in the *Wadiak* case, it is difficult to see how the petitioner can claim that this Court should take jurisdiction of the instant case because of a conflict of authority between the Seventh and Sixth Circuits.

It is also important to note that in the *Wadiak* case the Court of Appeals for the Seventh Circuit based its opinion to a considerable extent on the fact that the jury should not have been permitted to speculate on the reasons the barrels broke loose. The decision on this point appears to be somewhat in conflict with the decision of this Court in *Lavender v. Kurn, supra,* wherein the opinion of the court stated that it was the province of the jury to exercise a measure of speculation and conjecture in order to choose what "seems to them to be the most reasonable inference." See also the recent decisions of *Schulz v. Pennsylvania R. Co., supra,* and *Thomas v. Connemaugh and Black Lick R. Co.*, C. C. A. 3, 234 F. 2d 429 (1956).

In view of the fact that the lower court decision in the instant case did not set forth any rules or principles of law regarding speculation or conjecture by the jury, there cannot be any basis for claiming that there is a conflict of authority between the Court of Appeals Sixth Circuit and the Court of Appeals Seventh Circuit on this point.

In view of the above, there appears to be no basis for this Court assuming jurisdiction in the instant case.

CONCLUSION.

There was ample evidence from which the jury could have inferred that the respondent was injured as a direct and proximate result of the petitioner's negligence; and therefore, it would have been improper for the District Court to have invaded the province of the jury and substituted its judgment for theirs.

There is no conflict of authority between the decision of the court in the instant case (Court of Appeals, Sixth Circuit) and the decisions of the Fifth and Seventh Circuits which require settlement by this Court. The best that can be said is that the petitioner contends that the decisions of the courts below are erroneous. Even if this were so, it would not afford the basis for an assumption of jurisdiction by this Court.

For the foregoing reasons, respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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